Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RICHARD S. FISCHBEIN,

Petitioner,

v.

C. DOLORES TUCKER and WILLIAM TUCKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ALAN J. DAVIS, ESQ.
Counsel of Record
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

DONALD N. DAVID, ESQ.
FISCHBEIN BADILLO WAGNER HARDING
909 Third Avenue, 17th Floor
New York, NY 10022
(212) 826-2000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Was the alleged speech of petitioner protected by the First Amendment as an opinion based upon disclosed facts?

Was the alleged speech of petitioner qualifiedly privileged as fair comment upon pleadings filed in a judicial proceeding?

Did the respondents, after full discovery, adduce any evidence from which a reasonable juror could have concluded by clear and convincing evidence that the alleged speech of petitioner was made with actual malice?

PARTIES TO THE PROCEEDINGS

(Rule 14.1(b) Statement)

Petitioner

Petitioner is Richard S. Fischbein.

Respondents

Respondents are C. Delores Tucker and William Tucker.

Other Parties

Belinda Luscombe, Newsweek Magazine, Johnnie Roberts and Time, Inc. were parties to the proceeding below and have no interest in the outcome of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard S. Fischbein ("Fischbein" or "petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. 1-35) is reported at *C. Delores Tucker and William Tucker v. Richard Fischbein, et al.*, 237 F.3d 275 (3d Cir. 2001). The opinion of the United States District Court for the Eastern District of Pennsylvania (App. 36-49) is reported at *C. Delores Tucker and William Tucker v. Richard Fischbein, et al.*, Civ. A. No. 97-6150, 1999 WL 124355 (E.D. Pa. Feb. 9, 1999).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 9, 2001. The Third Circuit Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on February 14, 2001 (App. 50-51).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment (App. 52) states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment (App. 52) states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

As stated by Justice Brennan in his dissenting opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 36 (1990):

> [i]t is . . . imperative that we take the most particular care where freedom of speech is at risk, not only in articulating the rules mandated by the First Amendment, but also in applying

> them. *'Whatever is added to the field of libel is taken from the field of free debate.'*

(Emphasis supplied.) In order to protect the field of free debate, this petition urges the Court to consider that statements of opinion based upon fully disclosed facts enjoy the same protection under the First Amendment of the United States Constitution as do "pure" statements of opinion – especially when they concern pending litigation brought by a public figure, and are made by the parties and attorneys to that litigation.

As stated by Justice White in his majority opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986):

> [w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability . . . [and] *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.*

(Emphasis supplied.) This petition demonstrates that the United States Court of Appeals for the Third Circuit exceeded the scope of its authority by disregarding the foregoing summary judgment standard. Because there was no evidence presented from which a reasonable juror could have concluded that the petitioner acted with actual malice, reversal is warranted as a matter of law.

B. Background

Respondent-Plaintiff C. Delores Tucker is concededly a "public figure" by virtue of her prominent role as an activist against the lyrics of contemporary music known as "gangsta rap." In July of 1997, Mrs. Tucker and her husband, respondent-plaintiff William Tucker (collectively, "the Tuckers"), commenced an action against the Estate of Tupac Shakur (a deceased "gangsta rap" artist) and others, seeking, *inter alia*, damages respectively for intentional infliction of emotional distress including "loss of life's pleasures" and for loss of consortium ("*Tucker I*"). The complaint in *Tucker I* was amended on September 2, 1997, whereupon petitioner-defendant Richard S. Fischbein, Esquire, the co-administrator of the Estate ("Fischbein"), was added as a defendant in his representative capacity. In both the original and amended complaint, Mrs. Tucker's alleged damages included a "loss of life's pleasures," and Mr. Tucker asserted a claim for loss of advice, companionship, and consortium.

At the instigation of the Tuckers, the complaint in *Tucker I* quickly became a topic of debate in the media. The subject matter of the complaint prompted a number of statements, including Fischbein's alleged statement to Time reporter Belinda Luscombe ("Luscombe") that *Tucker I "was brought for emotional distress and that part of that was that . . . her sexual relationship with her husband was affected"* (the "September Fischbein Statement").[1]

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[1] There were four other alleged defamatory statements made as a result of *Tucker I*. They included: (1) a statement in the September 22, 1997 issue of *Time, Inc.* ("*Time*") magazine in the

C. The Instant Action

On October 1, 1997, respondents-plaintiffs filed the instant action against *Time*, *Newsweek*, Luscombe, Roberts, and Fischbein seeking, *inter alia*, damages for defamation. Extensive discovery was conducted, revealing the following undisputed facts:

- In deposition, the Tuckers' attorney, Mr. Angino, conceded that the original complaint in *Tucker I* did not rule out a claim for interference with sexual relations, and that someone reading the Tuckers' complaint might assume that it alleged damage to sexual relations.

- Mr. Angino admitted that, when *Tucker I* was initiated, he was not sure whether the

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article, "Shakur Booty," that "the prize for the most bizarre suit . . . goes to anti-rap warrior C. Delores Tucker, who claims that remarks made about her on Shakur's Album "All Eyez on Me" caused her so much distress that she and her husband have not been able to have sex . . . [and] [s]he wants $10 million;" (2) a statement in the September 1, 1997 issue of *Newsweek Magazine* ("*Newsweek*") in the article, "Grabbing at a Dead Star," that "[Mrs. Tucker] and her husband claim that a lyrical attack by Tupac iced their sex life;" (3) Fischbein's comment, quoted in the August 2, 1997 edition of the *Philadelphia Daily News* that "it's hard for me to conceive how these lyrics could destroy her sex life . . . but we can only wait for the proof to be revealed at trial;" and (4) Fischbein's August 20, 1997 statement to *Newsweek* columnist Johnnie L. Roberts ("Roberts") that Mrs. Tucker was bringing suit, in part, to recover for damage to her sex life, and his statement, quoted in the *Newsweek* article, that "I can't wait to hear her testimony on that subject." As to each, the Third Circuit had held that there is insufficient evidence of actual malice to reach a jury.

Tuckers sought recovery for damage to their sexual relations. He stated that "the purpose of the consortium count was to cover everything . . . every way in which Mr. Tucker was affected, every way."

- The Tuckers failed to state, either in their depositions or in affidavits, that they had ruled out any facet of their consortium claim at the time they originally filed it.

- The report of Dr. Harold Mignott, Mr. Tucker's physician, dated approximately one month before the Tuckers filed their claim for loss of consortium, reveals that Mr. Tucker had "a significant amount of difficulty with impotence" at the same time that he suffered a "significant amount of stress" resulting from the "harassment" and "investigation" of both himself and his wife.

- On July 31, 1997, the Tuckers issued a news release about their *Tucker I* complaint. Nothing in the release disclaimed damages for interference with sexual relations.

- After observing the media's reaction to the consortium claim, Mr. Tucker had the opportunity in at least three separate interviews to clarify that he and his wife were not seeking compensation for injury to their sexual relations. Instead, Mr. Tucker confirmed in all three interviews that interference with sexual relations was indeed an element of their claims.

- On August 13, 1997, in an interview with *Philadelphia Weekly*, Mr. Angino had a similar opportunity to state clearly for the public record that the Tuckers were foregoing any

claims stemming from interference with sexual relations. However, Mr. Angino failed to do so. Instead, he stated that loss of consortium "is a standard addition to lawsuits of this type and refers to all aspects of the marital relationship, not *necessarily* sex."

- On August 21, 1997, the Tuckers issued yet another press release. It again failed to disavow any claim arising out of Mr. Tucker's impotency or injury to the Tuckers' sexual relationship. Instead, the release confirmed the existence of such a claim and expressed the Tuckers' frustration that too much of the media's attention was focused on that aspect of the case: " 'All the media gleefully jumped on the so-called sex part in the suit that called attention to loss of consortium, which was put in there by my husband Bill, not by me,' [Mrs. Tucker] added, obviously nettled."

- The Tuckers admitted that neither they, nor Mr. Angino, nor anyone on their behalf, ever contacted Fischbein to correct his alleged misunderstanding of the Tuckers' loss of consortium claim.

- In both the original and amended complaint in *Tucker I*, Mrs. Tucker sought, without limitation, damages for "loss of life's pleasures."

- In both the original and amended complaint in *Tucker I*, Mr. Tucker sought, without limitation, damages for loss of consortium.

Upon the close of discovery, all of the defendants moved for summary judgment. The District Court granted the motion, holding as a matter of law that none of the statements at issue was capable of defamatory

meaning, and that none could be proven to have been made with actual malice. It thus dismissed the complaint in its entirety against all of the defendants.

D. The Third Circuit's Erroneous Majority Opinion

On appeal, a majority of the Third Circuit affirmed in part and reversed in part. It ruled that all of the subject statements were capable of defamatory construction. It held, however, that no reasonable juror could find that any of the statements was made with actual malice, with the sole possible exception of the September Fischbein Statement. As to the September Fischbein Statement – an opinion based upon disclosed facts – a qualified privileged statement made in the context of litigation – and a truthful interpretation of both the complaint and amended complaint in *Tucker I* – the Court of Appeals erroneously determined that a reasonable juror could find that Fischbein may have acted with actual malice in making it.

The Third Circuit's erroneous decision was based upon its findings that: (a) Fischbein's counsel had been served with a copy of the amended complaint in *Tucker I* prior to Fischbein making the September Fischbein Statement (but there is no evidence Fischbein saw it); and (b) the amended complaint in *Tucker I* sought to add Fischbein as a defendant for allegedly falsely claiming that *Tucker I* had been commenced by Mrs. Tucker "because of a loss of her sex life." From these findings, the Third Circuit held that a reasonable juror could possibly find that the September Fischbein Statement was made with

knowledge of its falsity or reckless disregard for the truth.

E. The Dissent

A thorough and vigorous nine-page dissenting opinion, urging that the findings of the District Court should have been affirmed in its entirety, was filed. The dissent by Judge Nygaard found that the complaint and amended complaint in *Tucker I* had been deliberately crafted to encompass a potential claim for damages based upon loss of sexual relations. The dissent also found that no reasonable juror could conclude that the September Fischbein Statement was made with either knowledge of falsity or reckless disregard for the truth.

As the dissent acknowledged, to allow a defamation claim against Fischbein to go to a jury upon a single, evenhanded statement of debatable opinion made to a reporter about a public figure would seriously erode the clear and convincing evidentiary standard for actual malice articulated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as well as the stringent summary judgment standard articulated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). It would also be strikingly inconsistent with prior decisions of other circuit courts, as detailed below.

As the dissent further implies, if not corrected, the Third Circuit's majority opinion will have a chilling effect upon free speech and fair comment in the public arena. In particular, both parties and their counsel will be discouraged from engaging in robust debate about newsworthy

lawsuits – one of the fundamental protections afforded to citizens of a free and democratic society.

Compounding the Constitutional impropriety of the Third Circuit's majority ruling is the undisputed fact that the respondents-plaintiffs, after full discovery, failed to come forward with a scintilla of evidence – let alone clear and convincing evidence – to support their defamation claim. In this regard, the Third Circuit failed to view the threshold questions within the prism of the applicable substantive evidentiary standard, as the dissent correctly acknowledged.

As a result of the majority's erroneous ruling, Fischbein is now the sole remaining defendant in this action. Absent relief from this Court, Fischbein must face a trial on the merits based upon a single statement that was never quoted in any article, and which was fully protected by the First Amendment of the U.S. Constitution, as well as longstanding common law principles and privileges of free speech.

REASONS FOR GRANTING THE WRIT

A. Fischbein's Statement Was Protected As An Opinion Based Upon Disclosed Facts

The majority of the Third Circuit erred in finding that Fischbein's statement was capable of defamatory construction. As a matter of law, the context in which the statement was made – to a news reporter with full knowledge of (and access to) disclosed facts, including the amended complaint – renders it non-actionable opinion.

Until the instant case, this was the law in the Third Circuit. It continues to be the law in all other circuits which have squarely addressed the issue, largely relying upon dicta in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 7-13 (1990). This Court should ensure that it remains the law.

Pursuant to the Restatement (Second) of Torts § 566 (App. 54) (adopted by the Pennsylvania courts and the majority of state and federal courts), "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable *only* if it implies the allegation of *undisclosed* defamatory facts as the basis for the opinion." (Emphasis supplied.) Where, as here, the statement in question is based upon *disclosed* facts set forth in a publicly filed pleading, there can be no defamation because the listener is free to accept or reject the opinion after independent scrutiny of the facts.

Thus, in *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989), it was held that statements made to a news reporter were merely opinions about disclosed facts to which the reporter had full access. 857 F.2d at 107-108. Recognizing the importance of public debate on heated issues, the Third Circuit stated in words which ring equally true in the case at bar:

> . . . "pure" opinions are either statements which provide the underlying factual assumptions of the speakers or statements made where those assumptions are known to the listener. Such "pure" opinion is *fully* protected . . . therefore, the court must examine a statement in context.

> The examination of context itself looks at many factors. Relevant here are considerations of the nature of the discussion in which the allegedly defamatory statements were made.
>
> The key factor in analyzing the statements at issue are the nature of the listeners' understanding. The circumstances of Nanavati's conversation with the reporters strongly favor treating Nanavati's statements as protected "pure" opinion. . . .
>
> The reporters to whom the alleged slander was spoken knew of the facts regarding this long standing and well-publicized feud. When Nanavati spoke to the reporters, the controversy between Nanavati and Sorensen had been raging in public for several years and the Hospital recently had released a comprehensive report of its investigation of Nanavati (the Black Book). . . . the reporters to whom Nanavati made his statements were aware of the existence of the Black Book and its contents. . . . The reporters were obviously aware that the speaker was presenting his opinion of Mrs. Steinmeyer's death and that other doctors and the Hospital held firmly opposing views.

Id. (Emphasis supplied.)

Similarly, in *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985), the Third Circuit held that statements of opinion made during the course of a "60 Minutes" segment were not defamatory as a matter of law. 758 F.2d at 970. There, the court stated:

> Although there may be no such thing as a false opinion, an opinion which is unfounded reveals

> its lack of merit when the opinion-holder discloses the factual basis for the idea. If the disclosed facts are true and the opinion is defamatory, a listener may choose to accept or reject it on the basis of an independent evaluation of the facts. . . . We agree with the district court that the factual bases for all stated opinions were adequately disclosed and therefore these statements were not actionable.

Id. at 972.

Finally, in the recent case of *Remick v. Manfredy*, 238 F.3d 248 (3d Cir.), *on remand*, Civ. No. 99CV-0025, 2001 WL 366630 (E.D. Pa. April 12, 2001), the Third Circuit, relying on *Redco, supra*, affirmed an order of the Eastern District of Pennsylvania granting summary judgment dismissing a defamation claim. Among other things, the Third Circuit determined that the defendant's statements were not actionable because the factual bases underlying his opinion were fully disclosed.

Thus, as a matter of law, if the facts upon which an alleged defamatory statement is based are either expressly set forth or known to the participants, there can be no implication that the speaker has special knowledge of otherwise undisclosed or unknown facts. *Remick, supra*, at 248. *See also Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 453 (3d Cir. 1987) (" '[p]ure' expression of opinion occurs also when the maker of the statement does not spell out the alleged facts on which the opinion is based, but both parties to the communication know the facts or assume their existence"); *Jenkins v. KYW, a Div. of Group W, Westinghouse Broadcasting & Cable, Inc.*, 829 F.2d 403, 409 (3d Cir. 1987) (district attorney's statements

about a judge regarding sentencing were protected expressions of opinion).

A majority of the Courts of Appeals are in agreement with the foregoing. *See Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848, 853 (10th Cir. 1999) (article created by defendant found to be constitutionally-protected speech under the First Amendment because underlying factual premises have been fully disclosed); *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998) ("[w]hen 'the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related' "); *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997) (opinion is not actionable under New York Law if speaker discloses facts on which it is based or does not imply existence of undisclosed facts); *Partington v. Bugliosi*, 56 F.3d 1147, 1156-1157 (9th Cir. 1995) ("we join with the other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) ("[b]ecause the bases for the . . . conclusion are fully disclosed, no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related"); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 731 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992) (complaint for defamation based upon opinion statement concerning disclosed facts dismissed and judgment entered

on the pleadings); *Stevens v. Tillman*, 855 F.2d 394, 400 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (when statement in form of opinion discloses defamatory facts or refers to facts in public record, it is not actionable apart from those facts).[2]

Applying the view of the majority of the various Courts of Appeals, which the Third Circuit failed to do, the September Fischbein Statement was not actionable because it was an opinion based upon disclosed facts. The sole recipient of this statement, Luscombe, had full access to the amended complaint, as well as the other sources identified above, and was able to draw her own conclusions from a review of their contents. Moreover, there was no implication or insinuation that Fischbein was privy to any undisclosed facts in drawing his opinion statement. Because the contextual posture of *Nanavati*,

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[2] *See also McClure v. American Family Mutual Insurance Company*, 223 F.3d 845, 852 (8th Cir. 2000) ("A commentator who advocates one of several feasible interpretations of some event is not liable in defamation simply because other interpretations exist [and] [c]onsequently, remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action because as a matter of law no threshold showing of "falsity" is possible in such circumstances."); *Moldea v. New York Times*, 22 F.3d 310, 317 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994) ("[b]ecause the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation"); *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288-89 (4th Cir. 1987) ("[a]s Thomas Jefferson observed in his first Inaugural Address . . . error of opinion need not and ought not be corrected by the courts 'where reason is free to combat it' ").

supra, (as well as the other circuit court cases cited above) and the instant case are identical, the September Fischbein Statement must be viewed as no less of a protected opinion (and no more susceptible to defamatory construction) than the comment in *Nanavati*. *See Nanavati*, 857 F.2d at 96.

The majority opinion cannot be reconciled with settled constitutional law. The Third Circuit erroneously concluded that the September Fischbein Statement that *Tucker I* "*was* a lawsuit about emotional distress and *one* of the things affected were [sic] her [Mrs. Tucker's] sexual relationship with her husband" (emphasis supplied) is susceptible of defamatory meaning cannot stand because the sole recipient of the statement had all of the facts available to test its truth.

The instant case consequently presents a unique opportunity for the Court to clarify the parameters of protection afforded to fact-based opinion speech. Not since *Milkovich*, *supra*, has the Court addressed this issue, and the Court in *Milkovich* was faced with factors that prevented it from definitively providing the needed clarification. Here, unlike *Milkovich*, it is undisputed that *all* of the facts upon which the September Fischbein Statement were based were fully disclosed. Unlike *Milkovich*, here, the recipient of the statement was not the general public, but just one person – a reporter who could reasonably be expected to check the public files to test the veracity of an adverse party's description of a complaint. Moreover, unlike *Milkovich*, the words in this case were not printed in an article for the whole world to see; they were spoken over the telephone in a private conversation – without any implication that the speaker was privy to other facts.

The words were never republished or repeated by the recipient, except in the course of discovery. This is a textbook example of a "pure" expression of factual opinion, and, as such, is particularly ripe for constitutional review.

B. Fischbein's Statement Was Privileged As Fair Comment Upon A Pending Judicial Proceeding

In addition to the foregoing, attorneys and parties to a proceeding, as well as the press, enjoy a qualified, common law privilege to make out-of-court statements that fairly and accurately report the contents of pleadings filed therein. *See Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 597 (1976) ("[t]he special protected nature of accurate reports of judicial proceedings has repeatedly been recognized").

Consistent with the above, the Pennsylvania Supreme Court has recognized that "[i]f . . . [an] account [of judicial proceedings] is fair, accurate and complete, and not published solely for the purpose of causing harm to the person defamed, it is privileged and no responsibility attaches, even though information contained therein is false or inaccurate." *Sciandra v. Lynett*, 409 Pa. 595, 600, 187 A.2d 586, 588-89 (1963); *see also Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 324, 275 A.2d 53, 56 (1971) (a speaker has "a qualified privilege to make a fair and accurate report of the proceedings, and if the article is not published solely for the purpose of causing harm to the person defamed, no responsibility attaches, even though the contents of the article are false or defamatory"); *Kormi v. Kormi*, Civ. A. No. 97-2788, 1998 U.S. Dist. LEXIS 3402, *11 (E.D. Pa.), *aff'd.*, 172 F.3d 859 (3d Cir.

1998) ("[s]tatements made outside a judicial proceeding may be afforded a qualified, or conditional, privilege if (1) they are a fair and accurate report of statements made or pleadings filed in a judicial action; (2) there is no abuse of the privilege – such as over-embellishment – and (3) the out-of-court statements are not uttered for the sole purpose of causing harm").

Here, the September Fischbein Statement was a fair and accurate comment by a named defendant (as well as the general counsel for another named defendant) about the contents of a pleading filed in a pending litigation. At the time, Ms. Tucker continued to assert a claim for emotional distress seeking damages for "loss of life's pleasures," and Mr. Tucker continued to assert a claim for loss of consortium. Thus, to state that *Tucker I* was about emotional distress, and that "one" of the things affected was the Tuckers' sexual relationship, was fair and accurate under any rational view of the facts.

Parties to legal proceedings – especially proceedings brought by public figures about public issues – must have the right to advocate their respective positions as part of the democratic litigation process. Fischbein did nothing more than that when he truthfully stated that part of the complaint in *Tucker I* encompassed a claim for loss of sexual relations. The September Fischbein Statement was equally true before and after service of the amended complaint upon him for the reasons stated *infra*. Accordingly, the qualified privilege available in the above-cited precedent also extends herein.

It is respectfully submitted that a majority of the Third Circuit failed to view the facts within the appropriate evidentiary prism. Fischbein enjoyed a qualified privilege as a counselor and a named defendant in *Tucker I* to comment fairly upon a pleading filed in that judicial proceeding. As such, it was incumbent upon the Tuckers to show that Fischbein abused his qualified privilege. Because the record was devoid of any such proof, the Court of Appeals was duty bound to affirm the District Court's summary judgment order in its entirety.

C. No Reasonable Juror Could Conclude That Fischbein's Statement Was Made With Actual Malice

The majority erred in ruling that the September Fischbein Statement could have been made with actual malice. The Court of Appeals so held – even though the language of the amended complaint in *Tucker I* continued to allege a "loss of life's pleasures" on the part of Mrs. Tucker, a "loss of consortium" on the part of Mr. Tucker, and failed to exclude beyond question claims for damages arising out of loss of sexual relations.

Significantly, at no time is Fischbein alleged to have made a statement that the complaint in *Tucker I* sought damages *only* for loss of sexual relations; rather, Fischbein's alleged comment was that *"part"* of the damages being sought were for loss of sexual relations. Because the amended complaint was more than reasonably susceptible to the very interpretation proffered by the September Fischbein Statement, Fischbein could not possibly

have spoken with knowledge of falsity or reckless disregard for the truth, and was at all times engaging in Constitutionally protected fair comment.

As stated by this Court in *Anderson v. Liberty Lobby, Inc*:

> . . . the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. 242, 255-256. A majority of the Third Circuit failed to apply this stringent standard when it opined that a reasonable juror was capable of finding by clear and convincing evidence that Fischbein acted with actual malice in making the September Fischbein Statement.

Under the Third Circuit's majority opinion, the Tuckers' entire claim against Fischbein rests solely upon the possibility that he read the amended complaint before

the Luscombe interview (which he denies), and should have gleaned from its language that appellants were not seeking any recompense for damage to their marital sexual relationship. According to the majority, a reasonable juror could conclude that Fischbein acted with actual malice because "it would be hard to interpret the First Amended Complaint in any other way" but that "the Tuckers were not seeking to recover for damage to their sexual relationship."

However, the very language of the amended complaint cannot sustain a finding of actual malice by clear and convincing evidence. It was incumbent upon the Tuckers to establish that Fischbein himself either *knew* that his statement was false or that he entertained serious doubts as to its truth just by virtue of reading the amended complaint. *See St. Amant v. Thompson*, 390 U. S. 727, 731-32 (1968). The record, however, is utterly devoid of any such evidence.

The following undisputed evidence establishes that Fischbein's statement was a truthful and accurate account of both the original and amended complaint, and could not have been made with actual malice:

- Paragraph 46 of the amended complaint alleged only that Fischbein's statement that *Mrs. Tucker* had filed her original suit *because* of a loss of sexual relations was false, not that no such claim was included at all. Notably, paragraph 46 is totally silent as to *Mr. Tucker*, who originally filed a loss of consortium claim, and continued to assert a loss of consortium claim in the amended pleading. Thus, the amended complaint continued to include a claim for damages arising out of

loss of sexual relations, which is normally included in a loss of consortium claim. Nor was any effort made to carve out from the "consortium" claim damages arising out of loss of sexual relations.

- Judge Nygaard identified the following "legal" definition of "consortium": "the right of a spouse to the company of, help of, affection of, *and sexual relations with his or her mate*" (emphasis supplied), and thus concluded that "it is axiomatic that a loss of consortium claim includes a claim for loss of sexual relations." Similarly, Black's Law Dictionary defines loss of "consortium" to encompass loss of *sexual relations*.

- The Tuckers elected to file a second amended complaint well after Fischbein made his allegedly defamatory statement. Only then did they unequivocally disclaim any demand for damages arising out of loss of sexual relations. This was an admission on the Tuckers' part that the amended complaint, either by inartful or purposefully cagey drafting, did not clearly disavow injury to the appellants' sexual union as one element of the consortium claim.

The Third Circuit plainly failed to evaluate the above evidence within the proper standards. As previously noted, the alleged speech was never quoted in an article or publication, but was instead an isolated comment to a news reporter, made privately over the telephone. The comment was about a publicly filed pleading by a public figure. The speaker was not only an attorney and executor of the estate of a deceased celebrity defendant, but

was also an individually named defendant in the pleading. The recipient of the alleged speech was a news reporter with full access to the pleadings. The alleged comment was an opinion that a *part* of the damages demanded in the pleading arose out of an alleged loss of sexual relations. The comment did not imply that Fischbein was privy to any undisclosed facts. Viewing these facts within a "clear and convincing" evidentiary prism, and considering that the Tuckers had no other evidence to support their claim after full discovery, no rational juror could have found actual malice.

No participant in a public debate should be put to a defamation trial for his mere failure to discern the actual alleged intended meaning of an (at best) ambiguously drafted pleading. Yet, that is precisely the result of the Third Circuit's majority opinion.

D. The Questions Presented Are Important

The questions presented in this petition are of paramount Constitutional importance from both a substantive and procedural standpoint.

Decisions of the various Courts of Appeals post-*Milkovich* suggest that additional guidance from this Court on the parameters of fact-based opinion speech would advance the efficient administration of federal and constitutional justice. By its majority opinion in the instant action, the Third Circuit has effectively created a split of authority in the circuits over a constitutional question of core significance. As noted above, unlike

Milkovich, the case at bar presents a textbook set of undisputed, fully disclosed facts, making it particularly appropriate for review to confirm that the First Amendment bestows the same protection to opinion speech based upon fully disclosed facts as it does to any other kind of "pure" opinion.

The disturbing implication of the Third Circuit's majority opinion is that private individuals are held to a different standard of actual malice than the press. In particular, a party to a civil action will be less free to report upon his view of disclosed facts than a news reporter. Parties will consequently be discouraged from speaking to news reporters who depend upon interviews as a major source of information. Despite decades of precedent making it clear beyond question that individuals and the press are held to the same standard of actual malice, Fischbein improperly has been left to stand trial as the sole remaining defendant in this action.

Granting this petition will ensure that the proper boundaries between the fields of libel and free speech are drawn and applied by the various Courts of Appeals with the requisite clarity. The need to draw clearer lines in this realm of speech is becoming of ever increasing importance in an age where entire television networks are devoted to reporting and debating the merits and developments of litigation in our state and federal court systems. The need to keep the Third Circuit in line with its sister courts is also paramount.

In addition, erosion of the strict standard for summary judgment in public figure defamation lawsuits articulated in *Anderson v. Liberty Lobby, supra*, must not be

tolerated. The First Amendment guarantees a defendant in a defamation suit commenced by a public figure the right to summary judgment when, after the close of discovery, there is no issue of fact from which a reasonable juror could conclude by clear and convincing evidence that the defendant acted with actual malice. The Third Circuit deprived Fischbein of this fundamental right to the extent that it reversed the decision of the district court, and also opened the door of Constitutional deprivation for potentially countless similarly situated defendants in the future.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN J. DAVIS, ESQ.
Counsel of Record
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

DONALD N. DAVID, ESQ.
FISCHBEIN BADILLO WAGNER HARDING
909 Third Avenue, 17th Floor
New York, NY 10022
(212) 826-2000

Counsel for Petitioner

United States Court of Appeals,
Third Circuit.

C. Delores **TUCKER**; William **Tucker**, her husband,
v.
Richard **FISCHBEIN**; Belinda Luscombe; Newsweek Magazine; Johnnie L. Roberts; Time Inc.
C. Delores **Tucker**; William **Tucker**, Appellants.

No. 99-1139.

Argued Oct. 1, 1999.
Filed Jan. 9, 2001.

Richard C. Angino (Argued), Angino & Rovner, Harrisburg, PA, Attorney for Appellants.

Alan J. Davis, Stephen J. Kastenberg, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA, Donald N. David (Argued), Beth W. Fischbein, Fischbein, Badillo, Wagner & Harding, New York, NY, Attorneys for Appellee Richard Fischbein.

Laura E. Krabill, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, PA, Paul G. Gardephe (Argued), Milton L. Williams, Jr., Time, Inc., Legal Department, New York, NY, Attorneys for Appellee Belinda Luscombe and Time, Inc.

Kevin T. Baine (Argued), Williams & Connolly, Washington, DC, Attorney for Appellee Newsweek Magazine and Johnnie L. Roberts.

Before NYGAARD, ALITO, and ROSENN, Circuit Judges.

OPINION OF THE COURT

ALITO, Circuit Judge:

This case marks the third round of litigation between C. Delores Tucker, a former state official and a community leader, and the record companies and performers responsible for what is known as "gangsta rap."[1] Since 1993, C. Delores Tucker has crusaded against gangsta-rap lyrics, which, she asserts, "grossly malign black women, degrade the unthinking young black artists who create [gansta rap], pander pornography to our innocent young children, hold black people universally up to ridicule and contempt, and corrupt its vast audience of listeners, white and black, throughout the world." App. at 2322. Mrs. Tucker has taken her message to shareholder meetings of major corporations to pressure them to divest their holdings in record companies that produce gangsta rap; she has also addressed Congress to urge that steps be

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[1] "Gansta rap" has been described as "a form of hip hop music that became the genre's dominant style in the 1990s, a reflection and product of the often violent lifestyle of American inner cities afflicted with poverty and the dangers of drug use and drug dealing. The romanticization of the outlaw at the centre of much of gangsta rap appealed to rebellious suburbanites as well as to those who had firsthand experience of the harsh realities of the ghetto." Encyclopedia Britannica, "Gangsta Rap" <http:// www.britannica.com/bcom/eb/article/3/0,5716,128693+1,00.html>. Prominent gangsta rap groups are described as "present[ing] tales of gangs and violence," "offer[ing] hard-hitting depictions of crack-cocaine related crime," and featuring "a marriage of languid beats and murderous gang mentality." *Id.*

taken to "curb and control the proliferation of vile, demeaning pornographic and misogynistic music." *Id.*

Mrs. Tucker's efforts caught the attention of the rap industry, and in August 1995, Interscope Records, Inc., filed suit against her in the United States District Court for the Central District of California (*Tucker I*), alleging that she had induced a breach of contract between Death Row Records, Inc., and Interscope. Interscope and Death Row voluntarily withdrew that suit. Then, in July 1997, Mrs. Tucker and her husband, William Tucker, filed a complaint in the United States District Court for the Eastern District of Pennsylvania (*Tucker II*), alleging that the lyrics in two songs by deceased rapper Tupac Shakur on an album called *All Eyez On Me* had attacked Mrs. Tucker using "sexually explicit messages, offensively coarse language and lewd and indecent words" and that she had received death threats because of her activities. Named as defendants were Shakur's estate; Interscope, which had produced Shakur's album; and four other companies, including Time-Warner, Inc., which allegedly maintained a financial interest in Interscope. Asserting claims for intentional infliction of emotional distress, slander, and invasion of privacy, Mrs. Tucker sought damages for medical expenses and mental injury. In paragraph 50, the Complaint alleged that her "husband, William Tucker has as a result of his wife's injuries, suffered a loss of advice, companionship and *consortium*." Tucker II Compl. ¶ 50 (emphasis added), App. at 23. Loss of consortium means loss by one spouse of "whatever of aid, assistance, comfort, and society [one spouse] would be expected to render or to bestow upon [the other]." *Hopkins v. Blanco*, 224 Pa.Super. 116, 302 A.2d 855, 856

(Pa.Super.1973), *aff'd*, 457 Pa. 90, 320 A.2d 139 (Pa.1974). Loss of consortium includes, but is not limited to, "impairment of capacity for sexual intercourse." *Restatement (Second) of Torts* § 693(1) (1977); *see also* W. Page Keeton, *Prosser and Keeton on Torts* 931 (5th ed.1984).

The filing of the Tuckers' lawsuit spawned numerous articles that focused on the "loss of consortium" claim. Among them was an article printed by the *Philadelphia Daily News* on August 2, 1997, in which the lawyer representing Shakur's estate, Richard Fischbein, was quoted as saying: "[I]t is hard for me to conceive how these lyrics could destroy her sex life . . . but we can only wait for the proof to be revealed in court." App. at 30. Following the *Philadelphia Daily News* article, wire and news services throughout the country picked up the story, and many of them quoted or paraphrased Fischbein's comment interpreting the Tuckers' claim as seeking compensation for damage to their sex life.

On August 20, 1997, *Newsweek* reporter Johnnie L. Roberts telephoned the Tuckers' attorney, Richard C. Angino, regarding an upcoming *Newsweek* story about the lawsuit. According to Angino, he informed Roberts that, although loss of consortium could mean loss of sex in some cases, it did not mean that in this case. *See* App. at 645. Roberts disputes Angino's account of this conversation.

On August 26, 1997, Roberts interviewed Fischbein in connection with the story. Roberts's notes show that Fischbein told him that one of the claims in the Tuckers' complaint involved interference with sexual relations. In addition to speaking with Fischbein and Angino, Roberts

read the complaint and looked up the definition of consortium before writing his article. On September 1, 1997, *Newsweek* printed an article written by Roberts and entitled "Grabbing at a Dead Star." The article stated: "Even C. Delores Tucker, the gangsta rap foe, wants a chunk [of Tupac Shakur's estate]. She and her husband claim that a lyrical attack by Tupac iced their sex life." App. at 90. Although the article did not mention the conversation between Roberts and Angino, it did quote Fischbein as commenting as follows regarding the loss-of-consortium claim: "I can't wait to hear the testimony on that subject." *Id.*

The next day, the Tuckers filed an amended complaint in *Tucker II* (the "First Amended Complaint"), which included an additional claim against Fischbein for making "false and misleading statements regarding the claim herein, through published statements that C. Delores Tucker filed suit because of a 'loss of her sex life.' " App. at 1711. The amended complaint was served on Fischbein and the other defendants, including Time-Warner, Inc.

On September 12, after he was served with the First Amended Complaint, Fischbein gave an interview to *Time* reporter Belinda Luscombe concerning the Tuckers' case. Luscombe stated in deposition that Fischbein had told her that "this was a lawsuit about emotional distress and one of the things affected were [sic] her sexual relationship with her husband." *See* App. at 2197. *Time* printed Luscombe's article, entitled "Shakur Booty," on September 15, 1997. *See* App. at 34. Although the article did not quote Fischbein, Luscombe admitted in her deposition that she based the article solely on her interview with

Fischbein and on other articles, most of which appear to be derived from Fischbein's initial comments to the press in early August.

On October 1, 1997, the Tuckers filed the complaint that is the subject of this action (*Tucker III*). The complaint alleges that Fischbein, Time, Inc. ("Time"), and Newsweek, Inc. ("Newsweek") defamed the Tuckers by characterizing their loss of consortium claim in Tucker II as a claim for loss of sexual relations. Specifically, the Tuckers maintain that Mrs. Tucker's reputation as a moral leader was compromised when Time and Newsweek printed Fischbein's characterization of her suit as one to recover for the lyrics' effect on her sex life.

Time, Newsweek, and Fischbein each moved for summary judgment, and the District Court granted their motions, holding that the statements in question were not capable of a defamatory meaning and, alternatively, that the Tuckers, who conceded that they were "public figures," could not adequately prove that the defendants acted with "actual malice." Although the defendants had also contended that the Tuckers could not prove that the statements were false, the Court made no explicit holding on that question. This appeal followed.

I.

"[A]lthough a defamation suit has profound First Amendment implications, it is fundamentally a state cause of action." *McDowell v. Paiewonsky*, 769 F.2d 942, 945 (3d Cir.1985). In this appeal, our first duty is to resolve a question of state law, *i.e.*, whether the Tuckers adduced

sufficient evidence to show that the statements in question were defamatory under Pennsylvania law. If the plaintiffs satisfied that burden, we must then determine if the First Amendment precludes recovery. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 270 (3d Cir.1980).

Under Pennsylvania law, a defamation plaintiff bears the burden to show:

> (1) The defamatory character of the communication.
>
> (2) Its publication by the defendant.
>
> (3) Its application to the plaintiff.
>
> (4) The understanding by the recipient of its defamatory meaning.
>
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.

42 Pa. Cons.Stat. Ann. § 8343(a) (1998). Under Pennsylvania law, the court must decide at the outset whether a statement is capable of defamatory meaning. *See Thomas Merton Ctr. v. Rockwell International Corp.*, 497 Pa. 460, 442 A.2d 213, 215-16 (Pa.1981). If the court determines that the statement is capable of a defamatory meaning, the jury must then decide whether the recipient actually understood the statement to be defamatory. *See Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 904 (Pa.1971).

A statement is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* (citing *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472, 476 (Pa.1960)). *Accord*

Restatement (Second) of Torts § 559. A court must examine the meaning of the allegedly defamatory statement in context, *see Beckman v. Dunn*, 276 Pa.Super. 527, 419 A.2d 583, 586 (Pa.Super.1981), and must evaluate "the effect [it] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Corabi*, 273 A.2d at 907. While it is not enough that a statement is embarrassing or annoying, *see Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677, 678 (Pa.1962), a court should not dismiss a complaint unless it is "clear that the publication is incapable of a defamatory meaning." *Vitteck v. Washington Broad. Co.*, 256 Pa.Super. 427, 389 A.2d 1197, 1200-01 (Pa.Super.1978).

The statements at issue here were the following:

(1) The statement in *Time*'s September 22, 1997, article, "Shakur Booty," that "[t]he prize for the most bizarre suit . . . goes to anti-rap warrior C. Delores Tucker, who claims that remarks made about her on Shakur's Album *All Eyez on Me* caused her so much distress that she and her husband have not been able to have sex. She wants $10 million." App. at 1634.

(2) The statement in *Newsweek*'s September 1, 1997, article, "Grabbing at a Dead Star," that "[Mrs. Tucker] and her husband claim that a lyrical attack by Tupac iced their sex life." App. at 90.

(3) Fischbein's comment, quoted in an August 2, 1997, *Philadelphia Daily News* article, that "[i]t's hard for me to conceive how these lyrics could destroy her sex life . . . but we can only

wait for the proof to be revealed at trial." App. at 29.

(4) Fischbein's August 20, 1997, statement to *Newsweek* columnist Johnnie L. Roberts that Mrs. Tucker was bringing suit, in part, to recover for damage to her sex life, and his statement, quoted in the *Newsweek* article, that "I can't wait to hear her testimony on that subject." App. at 31.

(5) Fischbein's statement to Belinda Luscombe of *Time* that Tucker II "was brought for emotional distress and that part of that was that . . . her sexual relationship with her husband was affected." App. at 2197.

The District Court held that none of these statements could have a defamatory meaning. The Court concluded that, although the statements might be annoying or embarrassing, they could not support a cause of action for defamation. The Court stated: "There is a vast difference between being annoyed and/or embarrassed on the one hand, and being disgraced and ridiculed to the extent that one's reputation is harmed and lowered in the estimation of the community, on the other." Dist. Ct. Op. at 6.

We cannot agree with the District Court's analysis. Statements considerably milder than or comparable to those at issue here have been held by the Pennsylvania Supreme Court to be capable of a defamatory meaning. For example, in *Birl v. Philadelphia Elec. Co.*, 402 Pa. 297, 167 A.2d 472 (Pa.1960), the Pennsylvania Supreme Court held that a statement that an employee quit without notice was capable of a defamatory meaning because recipients could conclude that the employee lacked honor and integrity "and was not a person to be relied upon

insofar as his business dealings were concerned." *Id.* at 476. In *Cosgrove Studio & Camera Shop v. Pane*, 408 Pa. 314, 182 A.2d 751 (Pa.1962), the Pennsylvania Supreme Court held that an advertisement was capable of a defamatory meaning because it implied that a competitor had bad business practices and might lead a recipient to question the competitor's integrity. *Id.* at 754.

Reading the statements at issue in this case in context and looking at the impression that they were likely to engender in the minds of the average reader, we conclude that each is capable of a defamatory meaning. Mrs. Tucker has led a campaign against the immorality of gangsta rap and those who profit from it. The statements made by the defendants – to the effect that Mrs. Tucker and her husband brought a $10 million lawsuit because Shakur's lyrics damaged their sex life – carry numerous disparaging implications. Because of the inherent implausibility of the idea that lyrics alone could cause millions of dollars of damage to a couple's sexual relationship, the statements were capable of making the Tuckers look insincere, excessively litigious, avaricious, and perhaps unstable. Furthermore, the statements tended to suggest that the Tuckers are hypocritical, that after condemning the gangsta rap industry for profiting from pornography, the Tuckers were only too willing to open up their own sex life for public inspection in order to reap a pecuniary gain. In the more colloquial language used by the defendants themselves, the statements suggested that the Tuckers were "[g]rabbing [a]t a [d]ead [s]tar['s]" "[b]ooty" and were willing to take the witness stand at trial and publicly provide the testimony about their sex

lives that Fischbein "[couldn't] wait to hear." Such statements were capable of lowering the Tuckers' reputation in the eyes of the community and of causing others to avoid associating with them.

It is worth noting that, not only were the defendants' statements capable of a defamatory meaning, but the Tuckers adduced evidence that their reputations were in fact adversely affected. *See* 42 Pa. Cons.Stat. Ann. § 8343(a)(4) (requiring plaintiff to prove that the recipient understood the statement as defamatory). In a *Philadelphia Daily News* article dated August 6, 1997, the author stated: "I also appreciate how some people felt betrayed when she filed a $10 million suit that has trivialized her and her movement. For a week now, even some of her most consistent supporters have been questioning her motives and snickering over the suit's allegation that her sex life has been ruined by a couple of Tupac Shakur raps." App. at 2143. An August 17, 1997, *Chicago Sun-Times* article noted: "[I]n my eyes Tucker has suffered a self-inflicted blow to her credibility. . . . Seems to me the real humiliation comes when a woman who has fought hard against gangsta rap makes the very personal and embarrassing claim that a couple of those very songs ruined her love life." App. at 265-66.

In short, the District Court erred when it held that the defendants' statements were not capable of a defamatory meaning under Pennsylvania law. The statements had the tendency to lower the Tuckers in the estimation of the community and to deter third persons from associating with them. We must therefore examine whether the First Amendment poses a bar to the Tuckers' claim.

II.

When a public official or public figure sues for defamation, the First Amendment demands that the plaintiff prove both that the statement was false and that it was made with "actual malice." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (emphasis in original omitted); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-65, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (Warren, C.J., concurring) (applying the *New York Times* standard to public figures); *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 931 (3d Cir.1990).

A. Actual malice

Under *New York Times v. Sullivan* and its progeny, actual malice means "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710. A public figure must adduce "sufficient evidence to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). "[A] court ruling on a motion for summary judgment must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists – that is, whether the evidence presented is such that a reasonable jury might find that actual malice has been shown with

convincing clarity." *Anderson v. Liberty Lobby*, 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

1. *Fischbein*

The Tuckers assert two grounds for holding that Fischbein acted with actual malice. First, the Tuckers argue that Fischbein, as a lawyer, should have known that a claim for loss of consortium may not have anything to do with damage to sexual relations. It follows, the Tuckers contend, that Fischbein was at least reckless when he told the press that Mrs. Tucker was trying to recover for injury to her sex life.

We reject this argument. A claim for loss of consortium *may* concern damage to sexual relations and, with respect to the period prior to the service of the Tuckers' First Amended Complaint, there is no evidence that Fischbein was informed that Mr. Tucker's consortium claim did not refer to damage to sexual relations. Nor is there evidence from which a jury could find that Fischbein entertained serious doubts about the truthfulness of his statements at any time before the filing of the First Amended Complaint. Consequently, the record is insufficient to show by clear and convincing evidence that Fischbein was guilty during this period of anything more than negligence in jumping to the conclusion that Mr. Tucker's loss-of-consortium claim related, at least in part, to sex. *See St. Amant*, 390 U.S. at 731, 88 S.Ct. 1323; *Time, Inc. v. Pape*, 401 U.S. 279, 290, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971) ("The deliberate choice of an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York*

Times."). The Tuckers point out that Fischbein, as the representative of Shakur's estate, had a motive for discrediting Mrs. Tucker, but circumstantial evidence of Fischbein's motive alone cannot satisfy the actual malice standard.

The Tuckers' second argument regarding Fischbein, however, does have merit. As previously noted, on August 27, 1997, the Tuckers filed their First Amended Complaint, which added Fischbein as a defendant and sought millions of dollars in damages. The basis for adding Fischbein was set out in Paragraph 46, which averred that Fischbein had "made false and misleading statements regarding the claim herein, *through published statements that C. Delores Tucker filed suit because of a 'loss of her sex life.'* " App. at 1711-12 (emphasis added). It is undisputed that Fischbein was personally served with this complaint before his interview with *Time* magazine reporter Belinda Luscombe on September 12, 1997.[2] Nevertheless, according to Luscombe's deposition, Fischbein told her during this interview that the Tuckers were attempting to recover for damage to their sexual relationship.

Based on this sequence of events, we are convinced that a reasonable jury could find by clear and convincing evidence that, at least as of the date of the service of the First Amended Complaint, Fischbein had actual knowledge that the Tuckers were not seeking to recover for

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[2] This argument does not apply to any statements made by Fischbein prior to August 27, 1997, including the comments published by the *Philadelphia Daily News* and the August 26 interview with Roberts of *Newsweek*.

damage to their sexual relationship. Since the First Amended Complaint alleged that Fischbein had defamed the Tuckers by stating that they were attempting to recover for damage to their sexual relations, a reasonable jury could certainly conclude that an attorney who read the complaint would understand that the Tuckers were not going to attempt to recover for such damage. (Indeed, it would be hard to interpret the First Amended Complaint any other way.) Fischbein states that he did not read the First Amended Complaint before speaking to Luscombe, but a reasonable jury could believe that a person who is added as a defendant in a multi-million dollar lawsuit is very likely to read the complaint shortly after receiving it in order to see why he or she has been sued. A reasonable jury could disbelieve Fischbein's story and find by clear and convincing evidence that Fischbein did read the First Amended Complaint before the interview. We must therefore reverse the judgment of the District Court insofar as it dismissed the Tuckers' claim against Fischbein with regard to the statements to Luscombe.

The dissent disagrees with our conclusion on this point because, in the dissent's view, "[t]he language of the Amended Complaint, in the context of the Tuckers' previous statements and actions, was insufficient to indicate a change in their attitude toward alleging a loss of sexual relations." Dissent at 292. But even if we agreed with the dissent's characterization of the Tuckers' prior statements,[3] the following stark facts remain: (a) the

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[3] The dissent seems at times to make findings of fact. For example, the dissent opines that "the statements made by the

Amended Complaint added Fischbein as a defendant and was served upon him; (b) the Amended Complaint asserted that Fischbein had defamed the Tuckers by stating that "C. Delores Tucker filed suit because of a 'loss of her sex life' " (App. at 1711-12); and (c) the Amended Complaint sought millions of dollars in damages. Surely a reasonable jury could find, by clear and convincing evidence, that Fischbein knew, after reading the Amended Complaint, that, whether or not the Tuckers had previously been seeking to recover for damage to their sexual relationship, they were no longer doing so.[4]

Tuckers and their attorney were deliberately cagey and equivocal so that they could, if they wished, introduce evidence of impotence and sexual disfunction at trial." Dissent at 290. This amounts to a finding of fact regarding the intent of the Tuckers and their attorney, and it is the province of the trier of fact, to make such a finding.

[4] The dissent "find[s] it ironic that [we] believe[ ] there could be actual malice in a statement so similar to [the following statement] attributed to Mr. Tucker in *The Philadelphia Tribune*" (Dissent at 292):

> Pointedly asked how the lyrics could affect his sex life, he said, "That's just a brief reference [in the lawsuit] – a small part of it. We have to represent the situation as accurately as we can and the only way to experience it is to have it happen to you." App. at 1631 (brackets in original).

At most, however, this statement may show Mr. Tucker's intent at the time of the article, in August 1997. It hardly establishes that the Tuckers were seeking to recover for damage to their sexual relations after they later filed the Amended Complaint.

Moreover, the dissent's interpretation of the statement attributed to Mr. Tucker in the article, while

2. *Roberts and Newsweek*

The Tuckers' case against Roberts and Newsweek includes some evidence from which a reasonable jury could infer actual malice, but not the clear and convincing evidence needed to survive summary judgment. Accordingly, we must affirm the District Court's grant of summary judgment in favor of Roberts and Newsweek. Viewing the evidence in the light most favorable to the Tuckers, their attorney, Richard C. Angino, spoke with Roberts on August 20, 1997, six days before Roberts wrote "Grabbing at a Dead Star." According to Angino, he told Roberts in the course of this phone call that "consortium can mean, in some cases, sex. I said most of the time it doesn't and it doesn't in this case." Angino Dep., App. at 636.

Other statements in Angino's deposition severely weaken the Tuckers' position, however, and make it impossible for them to satisfy the clear and convincing standard. For instance, when asked exactly what he said to put Roberts on notice that the Tuckers' claim did not

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certainly reasonable, is not compelled. Without knowing the exact question posed by the reporter (and the question is merely paraphrased in the article), it is not possible to rule out the possibility that Mr. Tucker was simply referring to his claim for loss of consortium, which need not necessarily have pertained to sex. In other words, he may have said that *the loss of consortium claim* was "just a brief reference [in the lawsuit] – a small part of it." If evidence of this statement is admitted at trial, it will be for the trier of fact to interpret it.

involve impairment of sexual relations, Angino replied: "I said only in the rarest of cases would you have a count that actually involves sex. *I'm under oath, so I cannot say to you that I said specifically, this case does not involve sex.*" App. at 431 (emphasis added). Actual malice requires a plaintiff to establish that the defendant had a *subjective* belief that the statement was false when made, and Angino's equivocation about the exact words he used defeats any hope the Tuckers might have of proving actual malice on the part of Roberts or Newsweek by clear and convincing evidence. Therefore, we affirm the District Court's entry of summary judgment in favor of those parties.

3. *Luscombe and Time*

The Tuckers set forth 24 theories under which, they assert, it could be found that Belinda Luscombe and Time acted with actual malice in connection with the "Shakur Booty" article of September 15, 1997. Many of these theories are grounded on allegations of poor journalistic practices – *e.g.*, that Luscombe had a preconceived story-line; that she did not follow Time's editorial guidelines; that she failed to conduct a thorough investigation; and that she copied from other stories but changed their language without a factual basis. As the District Court found, these theories of actual malice are without support in the case law. While we will discuss only a few of these theories below, we have carefully considered and rejected all of them.

The Supreme Court has made clear that even an extreme departure from professional standards, without

more, will not support a finding of actual malice. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Likewise, a failure to investigate, standing alone, does not constitute actual malice. *See St. Amant v. Thompson*, 390 U.S. at 730-31, 88 S.Ct. 1323; *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1089 (3d Cir.1985).

The Tuckers assert that Luscombe avoided the truth by relying on biased sources while ignoring the Tuckers' news release, which explained the import of their Complaint. Although the Supreme Court has held that purposeful avoidance of the truth may support a claim of actual malice, the evidence here falls short. In *Harte-Hanks*, the Court held that there was sufficient evidence of actual malice where, among other things, a reporter failed to interview a key witness to events being reported in a story, and the circumstances suggested that this was done for fear that the witnesses' statement might contradict the story the paper was committed to running. *See* 491 U.S. at 682-83, 109 S.Ct. 2678. Likewise, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the Court found actual malice when the *Saturday Evening Post* failed to make adequate investigative efforts in the face of notification that the report they were about to print was false. *Id.* at 169-70, 87 S.Ct. 1975. The element present in *Harte-Hanks* and *Butts* but lacking here is evidence from which a reasonable jury could infer that Luscombe doubted the veracity of her story. *See Harte-Hanks*, 491 U.S. at 692, 109 S.Ct. 2678.

The Tuckers assert that the service of the First Amended Complaint on Time-Warner, Inc., the parent corporation of Time, Inc., which publishes *Time* magazine

and employs Luscombe, should have put Luscombe on notice that the Tuckers did not seek recovery for injury to their sex life. This argument is far-fetched. Time-Warner, Inc., a huge media and entertainment conglomerate, was served because it was one of the original defendants due to its alleged connection with Interscope Records. There is no evidence that Luscombe or anyone else actually involved with the "Shakur Booty" article was given or read the First Amended Complaint, and unlike Fischbein, neither Luscombe nor anyone else employed by *Time* magazine was named as a defendant in that complaint. The Tuckers have simply adduced no evidence (let alone clear and convincing evidence) that Luscombe or anyone else involved with the "Shakur Booty" article was aware that the Tuckers did not intend to include injury to their sex life as a component of the loss of consortium claim.

We likewise see no merit in the Tuckers' argument that Luscombe and Time acted with actual malice because they copied other stories but then changed their language without a factual basis. Although the circumstances under which an article is changed may sometimes be enough to show actual malice, the present case does not fall into that category. This case is readily distinguishable from *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309 (3d Cir.1994). In *St. Surin*, a newspaper reporter interviewed an Assistant United States Attorney who confirmed that St. Surin was being investigated but refused to comment on whether charges would be brought. An editor, however, "changed it to read that the government expected to file charges against St. Surin the following week." *Id.* at 1318. We held that the evidence, viewed in the light most favorable to St. Surin, showed

that the editor was aware of facts showing that her changes to the article in question made it false. *See id.*

In this case, there is no comparable evidence. The "Shakur Booty" article was clearly derived in large part from previously published articles and did not change the import of those articles in any material way. Moreover, as discussed above, there is no evidence here from which a reasonable jury could find that Luscombe was on notice that the facts related in her story were false. Accordingly, we affirm the District Court's grant of summary judgment in favor of *Time* and Luscombe.

B.

Although the District Court based its judgment only on defamatory meaning and actual malice, it stated: "Counsel for all defendants have made various other arguments, not the least of which is that the statements were true. By not commenting on them, I have not necessarily rejected them." Dist. Ct. Op. at 13. On appeal, the defendants argue that the decision of the District Court may be affirmed on the alternative ground that the Tuckers have not adduced sufficient evidence that any of the challenged statements were false when made. Although we may affirm a decision on an alternative ground, *see, e.g., Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1089 n. 10 (3d Cir.1988), we decline to do so here.

Truth is an affirmative defense under Pennsylvania law, *see* 42 Pa. Const. Stat. Ann. § 8343(b)(1), but the United States Supreme Court has held that a public figure must bear the burden of proving falsity. *See Philadelphia*

Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (holding that "the common law's rule of falsity – that the defendant must bear the burden or proving truth – must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity"); *see also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 n. 49 (3d Cir.1980) (suggesting that Pennsylvania's practice of placing the burden of proving truth on the defendant is probably unconstitutional); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa.Super. 475, 448 A.2d 6, 13-14 (Pa.Super.1982) (same). Thus, even though Fischbein's comments to Luscombe are capable of a defamatory meaning, and even though he may have uttered them with actual malice, Fischbein cannot be held liable unless the Tuckers can prove that the comments were false.

We conclude that the Tuckers have pointed to proof that is sufficient to show, either by a preponderance or by clear and convincing evidence,[5] that Fischbein's statements to Luscombe after the filing of the First Amended

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[5] The Supreme Court has explicitly declined to decide whether the plaintiff must prove falsity by a preponderance of the evidence or by clear and convincing evidence. *See Harte-Hanks*, 491 U.S. at 661 n. 2, 109 S.Ct. 2678 (declining to resolve the issue, but acknowledging disagreement among the circuits). *Compare Firestone v. Time, Inc.*, 460 F.2d 712, 722-23 (5th Cir.1972) (Bell, C.J., concurring) (arguing for a clear and convincing standard) *with Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2nd Cir.1969) (suggesting a preponderance of the evidence standard) and *Rattray v. National City*, 51 F.3d 793, 801 (9th Cir.1995) (adopting *Goldwater*).

Complaint were false.[6] The First Amended Complaint alleged that Fischbein had defamed the Tuckers when he said that they were trying to recover for damage to their sexual relations. In light of that allegation, it seems clear – and a reasonable jury could certainly find – that the First Amended Complaint itself did not seek to recover for such damage. (Surely a reasonable jury could find that, if the Tuckers' case had gone to trial under the Amended Complaint, the Tuckers did not intend to seek to recover both on the theory that Mr. Tucker suffered a loss of consortium and that Fischbein defamed them by asserting that they intended to recover for a loss of consortium.) Fischbein, however, supposedly told Luscombe that "this was a lawsuit about emotional distress and one of things affected were [sic] her sexual relationship with her husband." App. 2197. We hold that there was sufficient evidence of falsity to go to the jury.

III.

Finally, we hold that the District Court correctly denied the Tuckers' motions to depose in-house counsel at *Time* and *Newsweek*. This Court exercises plenary review over a discovery order regarding claims of attorney-client privilege. *See Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 524 (3d Cir.1996). The communications with in-house counsel involved here were clearly

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[6] Because we have held that there is not sufficient evidence that Fischbein acted with actual malice prior to that date, we need not and do not decide whether there was enough evidence to show that the statements he made during that period were false.

for the purpose of rendering legal advice and therefore are privileged. The Tuckers argue that the privilege was waived because in-house counsel reviewed stories "in the regular course of business." This argument is frivolous. That reporters regularly consult with in-house counsel to discuss potential liability for libel does not thereby deprive those communications of the protection of the attorney-client privilege. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 394, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (holding that communications between corporate counsel and a corporation's employees made for the purpose of rendering legal advice are protected by the attorney-client privilege); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1302 (D.C.Cir.1988) ("Pre-publication discussions between libel counsel and editors or reporters would seem to come squarely within the scope of the privilege as defined in *Upjohn*.").

IV.

In sum, we affirm the District Court's grant of summary judgment as to *Time* and *Newsweek*, but reverse in part as to Fischbein. We also affirm the District Court's denial of the Tuckers' motion to compel the deposition of the in-house counsel at *Time* and *Newsweek*. The case is remanded in part for proceedings consistent with this opinion.

NYGAARD, Concurring and Dissenting.

I agree with much of what the Majority says in its well-reasoned opinion for the court. I disagree, however, with its conclusion with respect to defendant Richard Fischbein and therefore respectfully dissent. I conclude

that the District Court did not err; that a reasonable jury could *not* find that Fischbein acted with actual malice when speaking to *Time* magazine reporter Belinda Luscombe; and, that summary judgment should be affirmed in its entirety.

I begin with the Majority's conclusion that "prior to the service of the Tucker's first Amended Complaint, there is no evidence that Fischbein was informed that Mr. Tucker's consortium claim did not refer to damages to sexual relations." I agree, but I believe that the Majority dramatically understates the point. There is a substantial amount of uncontradicted evidence suggesting that, prior to the filing of their Amended Complaint, the Tuckers did intend to include sexual damages within their loss of consortium claim. For clarity, I will summarize this evidence in list form below:

> I. In his deposition, the Tuckers' attorney, Mr. Angino, stipulated that at the time the suit was commenced, the original complaint itself provided no indication that a claim for interference with sexual relations was *not* being pursued, and that someone reading the Tuckers' complaint might assume that it alleged damage to sexual relations. (App. 566-70). In my opinion, unless otherwise stated, it is axiomatic that a loss of consortium claim includes a claim for loss of sexual relations.
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> II. Mr. Angino also admitted in his deposition that when the suit was initiated, *he* was *not* sure whether the Tuckers sought recovery for damage to their sexual relations. (App. 576). He stated that "the purpose of the consortium count was to cover everything . . . every way in which Mr. Tucker was affected, every way." (App. 575).

The record does not contain any facts to the contrary.

III. The Tuckers themselves have failed to state, either in their depositions or in affidavits, that they had ruled out any facet of their consortium claim at the time they originally filed it.

IV. The report of Dr. Harold Mignott, Mr. Tucker's physician, reveals that Mr. Tucker had "a significant amount of difficulty with impotence" at the same time that he suffered a "significant amount of stress" resulting from the "harassment" and "investigation" of both himself and his wife. The report was dated approximately one month before the Tuckers filed their claim for loss of consortium. (App. 583).

V. On July 31, 1997, the Tuckers issued a news release about the *Tucker II* lawsuit.[7] Nothing in the press release disclaimed damages for interference with sexual relations. (App. 2072-73).

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[7] The complaint in *Tucker II* is itself a confusing farrago of missteps and errors. Appellants' attorney never discussed the loss of consortium claim with the Tuckers. (App. 518). The complaint was drafted by a law student. It misrepresented one song by taking "snippets of words from actual lyrics, words that are separated by many, many verses and run [ning] them together as if they are a continuous statement," creating what appellants' attorney now admits was "a gross and deliberate misrepresentation." (App. 534). The appellant's attorney neither listened to nor read the lyrics of the song that he alleges was defamatory. He never conducted a fact check of any of the critical allegations in the complaint. Indeed, he did not even sign it, nor is it clear from the record that he even read the final draft. His wife (who is not an attorney) signed it for him.

VI. After observing the media's reaction to the consortium claim, Mr. Tucker had the opportunity in at least three separate interviews to clarify that he and his wife were not seeking compensation for injury to their sexual relations. Instead, Mr. Tucker confirmed in all three interviews that interference with sexual relations was indeed an element of their claims. (App. 1630-31; 2142-43; 2145).

VII. On August 13, 1997, in an interview with *Philadelphia Weekly*, Mr. Angino had a similar opportunity to clearly state for the public record that the Tuckers were foregoing any claims stemming from interference with sexual relations. However, Mr. Angino failed to do so. Instead, he stated that loss of consortium "is a standard addition to lawsuits of this type and refers to *all aspects* of the marital relationship, not necessarily sex." (App. 2148-49) (my emphasis).

VIII. On August 21, 1997, the Tuckers issued yet another press release. It again failed to disavow any claim arising out of Mr. Tucker's impotency or injury to the Tuckers' sexual relationship. Instead, the release confirmed the existence of such a claim and expressed the Tuckers' frustration that too much of the media's attention was focused on that aspect of the case: " 'All the media gleefully jumped on the so-called sex part in the suit that called attention to loss of consortium, which was put in there by my husband Bill, not by me,' [Mrs. Tucker] added, obviously nettled." (App. 464).

IX. The Tuckers have admitted that neither they, nor Mr. Angino, nor anyone on their behalf, ever called Fischbein, at any time, to

> correct his misunderstanding of the Tuckers' loss of consortium claim. (App. 571, 1968).

The Tuckers have failed to provide *any* evidence, other than the language in their Amended Complaint, to suggest that they did not intend to claim loss of sexual relations. Instead, it is obvious to me that the statements made by the Tuckers and their attorney were deliberately cagey and equivocal so that they could, if they wished, introduce evidence of impotence and sexual dysfunction at trial.[8]

In spite of substantial evidence to the contrary, the Tuckers still claim that all of Fischbein's statements were made with actual malice; that is, with the "knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *New York Times v. Sullivan*, 376 U.S. at 279-80, 84 S.Ct. 710. According to the Majority, the Tuckers present two independent arguments in support of their position. Although I remain unconvinced that they clearly articulate even one, I will, for the sake of discussion, address both arguments in turn.

First, the Tuckers seem to suggest that Fischbein's legal training put him on notice that loss of consortium does not always imply harm to sexual relations. According to their brief:

> Fischbein, who is a lawyer who knows the definition of consortium, knew at the time that he

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[8] Another way of approaching this issue is to ask whether at trial, given the general loss of consortium that the Tuckers originally alleged, it would have been proper for the District Court to allow introduction of evidence of Mr. Tucker's sexual dysfunction. The answer clearly is yes.

> talked to the *Los Angeles Times* and the *Philadelphia News* and all of the other newspapers, including *Time* and *Newsweek*, that Mrs. Tucker did not claim in the Tucker I complaint that her sex life had been destroyed by the lewd lyrics of Tupac Shakur . . . Certainly a jury could find that Mr. Fischbein's uttering his sexual spin throughout this period constituted malice as defined by the Supreme Court. (Appellants' Br. at 46-47). The Majority quickly dismisses this argument, and there is no need to consider it further, except that I question the Majority's suggestion that Fischbein may have been negligent during the period prior to the filing of the Amended Complaint. Again, I emphasize that *all* of the evidence before the court indicates that the Tuckers, at least originally, *did* intend to pursue damages for loss of sexual relations. It is hard for me to imagine how Fischbein may have been negligent in any way.

Until this point, my concerns with the Majority's opinion have been fairly minor. I strongly disagree, however, with its disposition of the Tuckers' second main argument. According to the Majority, the Amended Complaint clearly disavowed any intent to pursue damages for loss of sexual relations. As such, a jury could find that Fischbein had read the complaint, and that his subsequent comments to *Time* magazine constituted actual malice.[9] Although I readily admit that this position is more

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[9] I agree with the Majority that a reasonable jury could find, in light of the high stakes surrounding the law suit, that Fischbein had read the Amended Complaint prior to his interview with *Time*. I disagree, however, with the Majority's conclusory statement that "it would be hard to interpret the

compelling than the Tuckers' first argument, I still cannot agree. The language of the Amended Complaint, by itself, is simply insufficient to convince a reasonable jury, under a clear and convincing evidence standard, that Fischbein had actual knowledge that the Tuckers were not seeking to recover damages for loss of sexual relations.

Before explaining my position, I want to be absolutely clear about two points. First, I agree with the Majority that, other than the Amended Complaint, "there is no evidence" that Fischbein acted with actual malice.[10]

First Amended Complaint any other way." In light of the Tucker's previous statements, and their penchant for ambiguity, I do not believe that a reasonable jury could establish actual malice based solely upon the Tuckers' five line paragraph.

[10] The Tuckers contend that they indicated, through personal interviews and statements by their attorney, that they did not intend to allege loss of sexual relations. This is simply not supported by the record. For example, in their Second Amended Complaint, they claim that their attorney told a Newsweek Reporter "*unequivocally* that the complaint did not allege . . . that the actions of Defendants related in the [original] complaint had anything to do with their sex life." (App. 24). Their attorney's signature appears on this complaint. During his deposition, however, Mr. Angino admitted that, "I said only in the rarest of cases would you have a count that actually involves sex. I'm under oath, so I cannot say to you that I said specifically, this case does not involve sex." (App. 646). This is but one of many examples where The Tuckers were vague and ambiguous in their public statements and in their declarations to this Court. The Tuckers also argue that the Webster's dictionary definition of consortium supports their case. (App. 25). I did a quick check to verify this claim. Using the Internet (*see www.dictionary.com*, accessible via *www.websters.com*), I obtained the following definition of consortium: 3. *Law.*

Thus, even under the Majority's decision, the Tuckers' *entire* claim rests solely upon the language in the Amended Complaint. As the Tuckers admit in their brief, only two paragraphs, out of the seventy-one contained in the complaint, address the question of sexual relations:

> 45. Defendant [Fischbein] has continued to defame and harass plaintiff by holding her up in a false light even after the complaint in this matter was filed on June 21, 1997.
>
> 46. Defendant Fischbein made false and misleading statements regarding the claim [asserted in the original complaint], through published statements that C. Delores Tucker filed suit because of a "loss of her sex life." The statement was untrue, and defendant Attorney Fischbein should have known it was untrue.

(App. 1711-12). Second, the Tuckers filed the Amended Complaint on August 27, 1997. The only statements made by Fischbein *after* that date, and thus the only potentially actionable comments, were those to *Time* magazine reporter Belinda Luscombe. I agree with the Majority that *all* other comments were made without actual malice. Thus, the question over which the Majority and I disagree is a fairly narrow one, and I would characterize it in the following manner: After all of the Tuckers'

The right of a spouse to the company of, help of, affection of, and sexual relations with his or her mate.

Unless this definition has changed radically in the past three years, *Webster's* cuts strongly *against* the Tuckers. In sum, none of this "evidence" is sufficient to persuade a reasonable jury that any of the defendants acted with actual malice in "misinterpreting" the Tuckers' claims.

actions and comments to the contrary, did the language in the Amended Complaint sufficiently clarify the parameters of the loss of consortium claim so that a reasonable jury could find that Fischbein's comments to *Time* magazine were made with a reckless disregard for the truth? I strongly believe the answer is no.

The language of the Amended Complaint, in the context of the Tuckers' previous statements and actions, was insufficient to indicate a change in their attitude toward alleging a loss of sexual relations. In spite of all the media attention, and all the harm that it supposedly caused, the complaint failed to contain a simple, categorical statement that the Tuckers were foregoing any claim for interference with sexual relations. Instead, it continued to allege that Mr. Tucker had "suffered a loss of . . . consortium," using *the very same language* that was contained in the original *Tucker II* complaint. (App. 1713). The only addition was a short paragraph stating that *Mrs. Tucker* did not file the original suit because of a loss of sexual relations. It said nothing about *Mr. Tucker*, who had originally filed the loss of consortium claim. And, as their own attorney testified, "when you damage one spouse, you damage the other spouse in each and every way." (App. 566). My conclusion is underscored by the fact that one month later, and simultaneous with the filing of the complaint at issue in this appeal, the Tuckers filed a Second Amended Complaint to *Tucker II*, in which they unequivocally stated, *for the first time*, that they were not seeking damages for interference with sexual

relations. This came far too late to serve as an effective form of notice to Fischbein.[11]

Even if the language of the complaint did clearly communicate the Tuckers' position, as the Majority so holds, it is not clear to me that this evidence *by itself* is enough to support a jury's finding of actual malice. I am deeply troubled by the fact that, in spite of intense media scrutiny and its concomitant pressures, the Tuckers never publicly clarified the nature of their suit or contacted Fischbein directly, until they filed the complaint in this case. In short, they did nothing to curb public scrutiny

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[11] With regard to the gravamen of this Second Amended Complaint, plaintiffs' attorney responded as follows in his deposition:

> Q. And why did you feel there was a need to have – to file a Second Amended Complaint?
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> A. I couldn't believe how dense the defense were.
>
> Q. And in the Second Amended Complaint, you placed a dictionary definition of consortium; is that correct?
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> A. That was a joke. It was really a joke.
>
> Q. Well, wait a minute, sir. Are you saying that you were perpetrating a joke in a Federal Court Complaint; is that what you are telling me?
>
> A. That's what I'm telling you. I said if I had to actually give you a dictionary definition . . .
>
> Q. So you were – you were playing around a little bit in a Federal Court Complaint; is that correct?
>
> A. I was saying look consortium means this.
>
> Q. So you were playing around a little bit.
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> A. You – you might say that.

App. 829-30.

other than amend their original complaint to include new claims. After the numerous public comments and accusations by the Tuckers, it is simply unreasonable to require Fischbein to infer solely from the language of the Amended Complaint that the Tuckers had changed their position.

Finally, even if the Amended Complaint by itself was enough to support a jury finding of actual malice, I do not believe that Fischbein's comments were reckless. As previously discussed, the only comments made subsequent to the filing of the Amended Complaint were those to *Time* magazine on September 12, 1997. According to Luscombe's uncontradicted notes and testimony, Fischbein stated only that *Tucker II* "was brought for emotional distress and that part of that was that her sexual relationship with her husband was affected." (App. 2197). *Time* magazine did not quote Fischbein, and Luscombe's article relied heavily upon seven previous articles, all published in respected sources from *Rolling Stone* to *The Washington Post* prior to the filing of the Amended Complaint. I find it ironic that the Majority believes there could be actual malice in a statement so similar to one attributed to Mr. Tucker in *The Philadelphia Tribune* (my emphasis):

> Pointedly asked how the lyrics could affect his sex life, he said, "That's just a brief reference [in the lawsuit] – *a small part of it*. We have to represent the situation as accurately as we can and the only way to experience it is to have it happen to you."

As previously discussed, in addition to this statement, there is a substantial amount of evidence that indicates that the Tuckers originally did bring their suit, at

least in part, to recover for loss of sexual relations. Regardless of whether they later changed their position, a literal reading of Fischbein's statement to *Time* reveals no "reckless disregard for the truth."

The record demonstrates that Fischbein, at the time of his conversation with *Time* magazine, (1) was not aware that the Tuckers intended to relinquish their claims for interference with sexual relations, and (2) even if he was, his comments were not reckless. As a result, I conclude that the Tuckers cannot meet their burden of demonstrating facts sufficient to show that Fischbein made *any* statements that he suspected were false. As such, I would affirm the grant of summary judgment in its entirety.

United States District Court, E.D. Pennsylvania.

C. Delores TUCKER and William Tucker, her husband, Plaintiffs,

v.

RICHARD FISCHBEIN, TIME INC., Belinda Luscombe, Newsweek Magazine and Johnnie L. Roberts, Defendants.

No. CIV. A. 97-6150.

Feb. 9, 1999.

MEMORANDUM

BUCKWALTER, J.

Defendants Time Inc., Belinda Luscombe, Newsweek Magazine, Johnnie L. Roberts and Richard Fischbein have all filed motions for summary judgment.

I. COMPLAINT AGAINST TIME AND LUSCOMBE

Essentially, the complaint against Time and Luscombe is that despite (1) the dictionary definition of consortium; (2) interviews given by plaintiffs' attorney that plaintiffs' sex life had nothing to do with the complaint; and (3) the filing of an amended complaint with the allegation in paragraph 46 that "Defendant Fischbein made false and misleading statements that C. Delores Tucker filed suit because of a 'loss of her sex life'." Luscombe, a writer, employee, servant and agent of Time, Inc. wrote an article in the People section of the September 22, 1997 issue entitled "Shakur Booty" stating:

> The prize for the most bizarre suit, however, goes to anti-rap warrior C. Delores Tucker, who claims that lewd remarks made about her on

> Shakur's album "All Eyez On Me" caused her so much distress that she and her husband have not been able to have sex. She wants $10 million.
>
> Am. Compl. ¶ 22.

The above article, according to plaintiffs, constitutes a defamatory and malicious statement that Time and Luscombe knew was not the truth when written and knew that it would, upon publication, embarrass and humiliate plaintiffs. Plaintiffs' counsel admits that plaintiffs, Mr. and Mrs. Tucker, are public figures and that they therefore have the burden of proving that the *Time* article at issue was published with actual malice.

By way of a brief background, in September of 1993, the plaintiffs began a crusade against gangsta rap, which they viewed as being pornographic, drug oriented and misogynistic. Plaintiffs attempted through various methods to publicize their crusade. One method, among others, was by filing lawsuits. Other methods included appearances at shareholder meetings of large corporations, meeting throughout the country with public officials, attendance at Congressional hearings and before state legislatures, and leading of street demonstrations in Philadelphia, New York and Washington, D.C. It was, however, the filing of their lawsuit on July 21, 1997, against, among others, the estate of Tupac Shakur, a famous gangsta rap performer, which ultimately prompted *Time*'s September 15, 1997 article.

Before the *Time* article, approximately 60 newspapers and magazines published similar articles about the lawsuit. Among them were: *The Associated Press, The Baltimore Sun, The Dallas Morning News, The New York Daily News,*

The Philadelphia Daily News, The Minneapolis Star-Tribute, The Washington Post and *Newsweek,* to name a few. It is interesting to note that virtually all of these publications "sensationalized" the story by referring to how the Tuckers claimed that their sex life had been ruined by Tupac Shakur's rap lyrics. The most common theme of these stories printed before the *Time* article was that Mrs. Tucker said the anguish from the lyrics undermined "or cut down on" her sex life with her husband.

Of the 66 accounts of the lawsuit submitted in Time and Luscombe's Exhibits, only the August 21, 1997 edition of *The Washington Post* ignored the sex angle of other papers, although not entirely. Its report under "Names & Faces" was as follows:

> Activist C. Delores Tucker, head of the National Political Congress of Black Women, has sued the estate of slain rap artist Tupac Shakur, saying his lyrics slandered her and damaged her relationship with her husband of more than 40 years, William Tucker.
>
> Tucker and former U.S. drug policy director William Bennett campaigned to stop the distribution of violent and graphic "gangsta" rap and rock lyrics. She sued Shakur's estate for $10 million earlier this week in Philadelphia, claiming that Shakur's 1996 CD "All Eyez On Me," which contains derogatory sexual references to her, caused her "great humiliation, mental pain, and suffering" and contributed to loss of her husband's "advice, companionship and consortium."

> "It's hard for me to conceive how these lyrics could destroy her sex life," said Richard Fischbein, an attorney who oversees Shakur's estate.

The Washington Post. Aug. 2, 1997, at C3 (attached as Exhibit 17 to Defs. Mem.).

For purposes of this opinion, it is clear that nowhere in the complaint originally filed against the Estate of Tupac Shakur on July 21, 1997, or in the amended complaint filed September 2, 1997, is there a specific reference to the "sex life" of either plaintiff. In both complaints, paragraphs 50 of original and 52 of the amended, the following allegation is made:

> Plaintiff's husband, William Tucker has as a result of his wife's injuries, suffered a loss of advice, companionship and consortium. [1]

Compl. ¶ 50; Am. Compl. ¶ 52.

In their summary judgment motion, Time and Luscombe argue that plaintiffs, in order to defeat the motion, must demonstrate that a rational jury could find that Luscombe's statements published by Time:

> (1) were defamatory;
>
> (2) were statements of potentially verifiable facts as opposed to opinion;

---

[1] Consortium, Conjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation. Loss of "consortium" consists of several elements, encompassing not only material services but such intangibles as society, guidance, companionship, and sexual relations. *Black's Law Dictionary* 309 (6th ed.1990) (citations omitted).

(3) were of and concerning both plaintiffs;

(4) were false;

(5) resulted in injury to them; and

(6) were published with actual malice.

See Defs. Mem. at 15.

I will discuss in some detail items (1) and (6). While it is not clear at this stage of the proceedings, I find, with regard to the remaining arguments presented in items (2) through (5), that there is some validity to Time and Luscombe's claims.

Time and Luscombe's claim that whether the statement was or was not defamatory is a matter to be dealt with initially by the court. In this regard, plaintiffs quote at length from Judge Giles' opinion in *Weinstein v. Bullick*, 827 F.Supp. 1193 (E.D.Pa.1993). In that opinion, Judge Giles cited Pennsylvania cases supporting the following propositions:

> (1) The threshold question in a defamation action is whether the publication is capable of defamatory meaning. This is for the court to decide.
>
> (2) If the court finds a statement could be construed as defamatory, it is for the jury to determine if it was so understood by the recipient.
>
> (3) A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.
>
> (4) In determining defamatory meaning, the court must look to the effect that it is fairly

> calculated to produce; the impression it would naturally engender in the minds of average persons among whom it is intended to circulate.
>
> (5) The statement must be reviewed in the entire context.

See id. at 1196-97.

Time and Luscombe generally agree with those statements of Pennsylvania law but add that "[A] defamatory communication 'necessarily involves the idea of disgrace' and tends to cause others to 'ostracize and shun' the subject." *See* Defs. Mem. at 31 (quoting *Beckman v. Dunn*, 419 A.2d 583, 586-87 (Pa.Super.1980)). *See also* W. Page Keeton *et al.*, *Prosser and Keeton on Law of Torts* § 111, at 739 (4th ed.1971)(stating that a defamatory communication "involves the idea of disgrace" and "reflects upon [the subject's] character").

The statement by Time and Luscombe could certainly be annoying and also embarrassing to the plaintiffs. But such effect cannot form the basis for a defamation action. There is a vast difference between being annoyed and/or embarrassed on the one hand, and being disgraced and ridiculed to the extent that one's reputation is harmed and lowered in the estimation of the community, on the other. I cannot see the latter happening from Luscombe's statement published by Time in this case. Thus, I find it is not defamatory as a matter of law.

Quite apart from the issue of whether the statements are defamatory is the matter of actual malice as applicable to this case. Plaintiffs, in their effort to show that this issue deserves a jury determination, has listed 24 matters

which they say circumstantially show malice. The majority of these 24 matters (15 by my count) deal with the alleged inadequate investigation by Luscombe before writing the story. I have paraphrased them as follows:

> (3) Time/Luscombe's failure to obtain Tucker I complaint before reporting on its contents.
>
> (4) Time/Luscombe's preconceived story line.
>
> (5) Time/Luscombe's reliance upon Fischbein.
>
> (6) Time/Luscombe's adopting Fischbein's sexual spin without quoting him.
>
> (7) Time/Luscombe's ignoring the plaintiff's 7/31/97 news release and news articles saying media was distorting Tuckers' claim.
>
> (10) Time/Luscombe's failure to contact plaintiffs' lawyer.
>
> (11) Time/Luscombe's failure to ask the critical question as to whether Mrs. Tucker claimed that lewd lyrics destroyed her sex life.
>
> (12) Time/Luscombe's selecting articles and story lines that supported their story.
>
> (15) Time/Luscombe's not attempting to get the other side of the story.
>
> (16) Time/Luscombe's failure to include mandated document in the Time Library.
>
> (17) Time/Luscombe's failure to conduct a proper investigation of a story that was not "hot news."
>
> (18) Plagiarizing other stories.
>
> (19) Time/Luscombe's writing a story on an unfamiliar subject without consultation.

> (20) Time/Luscombe's failure to be aware of the amended complaint averring falsity of media spin.
>
> (24) Luscombe's swearing under oath that she did not even see *JET* article when it is in her Time Library source file and highlighted.

See Pls. Mem. at 1-3. Two of the remaining nine items deal with Time/Luscombe's failure to conform to its own guidelines and the Professional Journalists Code of Ethics. Three more items allege the publishing of the false statement because of its sensational value and failure to retract it. And the two remaining types of conduct listed by Plaintiffs are Time's post-suit actions intending to preclude discovery, and Luscombe's swearing under oath that she principally relied on *Rolling Stone* and *Newsweek* magazines in her story when she expressed doubt in her deposition.

The problem, as I see it, with plaintiffs' argument is that it lacks support in case law. As stated earlier, the plaintiffs admit that they are public figures and that therefore they have the burden of proving that Time published Luscombe's article with actual malice.

In *Masson v. New Yorker Magazine*, 501 U.S. 496, 511, 111 S.Ct. 2419, 2429 (1991), the Court expressed the manner in which the First Amendment limits libel laws by summarizing existing law as follows:

> The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, *i .e.*, with

> "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or acted with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964).

The *Masson* court went on to explain that the "actual malice under The New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Id.* Referring to the term "actual malice" as one that can "confuse as well as enlighten" and opining that "the phrase may be an unfortunate one," the Court concluded that, "[I]n place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." *Id.* at 511, 111 S.Ct. at 2430.

With the above summation of the legal setting into which this case falls, the question is: Can plaintiffs demonstrate sufficient material facts in dispute, which if viewed in favor of plaintiffs, could support a rational jury's finding by clear and convincing evidence that Time and Luscombe published the alleged libelous statement with malice? They cannot, in my judgment, because the record, viewed in favor of plaintiffs, the non-moving party, suggests, at best, that Time and Luscombe were

negligent in failing to investigate the factual basis of its published statements about plaintiffs.

The allegation that Time's law department improperly equated consortium with sex provides no evidence of malice for several reasons, not the least of which is that equating consortium with sex is not the least bit unusual. Moreover, the suggestion that not permitting in-house counsel to testify, a decision which I upheld, somehow equates to malice is not logical. The same is true when plaintiffs state that the noncompliance with professional in-house standards of conduct somehow fairly imply malice. At most, this also implies carelessness not rising to the level of reckless disregard for the truth.

The uncontested record, as earlier eluded to, reveals that Luscombe relied on previously published reports in reputable publications. Several cases suggest that this type of good faith reliance precludes a finding of malice as a matter of law. *See McFarlane v. Sheridan Square Press. Inc.*, 91 F.3d 1501, 1510 (D.C.Cir.1996). In short, there is no clear and convincing evidence that Time and Luscombe "in fact entertained serious doubts as to the truth" of the article or that Time and Luscombe had a "subjective awareness of probable falsity." This high standard of proof, as established in *McDowell v. Paiewonsky*, is simply not met on the summary judgment record before this court. *See* 769 F.2d 942, 951 (3d Cir.1985).

II. COMPLAINT AGAINST NEWSWEEK, INC. AND JOHNNIE L. ROBERTS

The sum and substance of plaintiffs' complaint against Newsweek and Roberts is that the following article was defamatory:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

Johnnie L. Roberts, *Legal Affairs – Grabbing at a Dead Star, Newsweek,* Sept. 1, 1997, at 48.

Among other defenses, Newsweek and Roberts, like Time and Luscombe, contend that the article is not defamatory and that the plaintiffs cannot prove actual malice. For substantially the same reasons as set forth in the Time/Luscombe discussion, I do not find the language "iced her sex life," and the statement later in the article that Mrs. Tucker "can no longer have sex with her husband" are defamatory, in the entire context of the article. That such language can be annoying and embarrassing is certainly possible, but it is not sufficient for a defamation action.

As to actual malice, or the lack thereof, it is difficult to determine from plaintiffs' brief exactly what they are relying upon to show actual malice with regard to the Newsweek/Roberts account. The primary factor stems from a conversation between plaintiffs' attorney and Johnnie Roberts. Viewing this factor most favorably for

plaintiffs would result in a finding that plaintiffs' attorney told Roberts before he wrote the story that "consortium can mean, in some cases, sex. I said most of the time it doesn't and it doesn't in this case." Angino Dep. at 165, lines 15-17 (attached as Exhibit 6 to Pls. Mem.). Newsweek and Roberts admit in their reply brief that a finding that Roberts was lying could support a finding of actual malice. But the record on summary judgment falls far short of clear and convincing evidence that Roberts was lying in his deposition. Plaintiffs' counsel concedes this when he says in his deposition, "I don't think when he [Johnnie Roberts] testified in his deposition that he was lying." *Id.* at 163, lines 11, 12.

What plaintiffs seem to be arguing is that plaintiffs' counsel told Roberts that this lawsuit was not about sex but that Roberts went ahead and wrote his story while flat out denying that version of his conversation with Plaintiffs' counsel. Unfortunately for plaintiffs, as virtually conceded by plaintiffs' counsel, this is not the way it happened.

The following exchange took place at the deposition of Roberts by plaintiffs' attorney:

> Q. Did I say that she couldn't have any sex with her husband?
>
> J.R. No.
>
> Q. Is that she could no longer have sex?
>
> J.R. No, you didn't use those precise words, no.
>
> Q. Where did you get the words, "Can no longer have sex with her husband?"

> J.R. That's one of the definitions of consortium, that it affects sexual relationships.

Roberts Dep. at 219, lines 2-17 (attached as Exhibit 13 to Pls. Mem.).

This exchange seems to suggest that Roberts knew what plaintiffs' attorney's position was with regard to the loss of consortium claim, but that he chose to ignore it in light of his understanding of consortium. Simply not accepting plaintiffs' counsel's version of loss of consortium, especially in light of his other investigatory efforts, *see* Defs. Mem. (Roberts Decl. thereto), is insufficient to support a claim of actual malice. By that I am saying that the evidence does not, as a matter of law, support plaintiffs' theory that Newsweek published the Tucker story knowing that it was false or with a reckless disregard as to its truth or falsity. Moreover, plaintiffs' attorney even told Roberts that consortium can in some cases mean sex, even though in this case, it does not.

III. COMPLAINT AGAINST FISCHBEIN

Fischbein in his motion for summary judgment argues that his comments are incapable of being defamatory. I agree. Fischbein was quoted in the *Philadelphia Daily News* as saying "[I]t's hard for me to conceive how these lyrics could destroy her sex life . . . [b]ut we can only wait for the proof to be revealed in court ." Jamal E. Watson and Jim Smith, *A Dirty Rap, Philadelphia Daily News*, Aug. 2, 1997, at 5 (attached as Exhibit E to Def. Mem.). Fischbein was also quoted in *Newsweek* as saying, "I can't hardly wait to hear testimony on that subject."

Johnnie L. Roberts, *Legal Affairs – Grabbing at a Dead Star, Newsweek,* Sept. 1, 1997, at 48.

In viewing plaintiffs' lengthy but largely irrelevant brief in reply to Fischbein's motion, it seems that the chief gripe of plaintiffs' counsel is that Fischbein has made a mockery out of the discovery process. Out of a 45 page brief, pages 7 to 45 are nothing more than extracted portions of Fischbein's deposition testimony.

Plaintiffs' brief refers only to Fischbein's "defamatory sexual spin." Assuming that Fischbein made the exact remarks as attributed to him, I am convinced they are not defamatory as I have defined that term in this opinion.

Counsel for all defendants have made various other arguments, not the least of which is that the statements were true. By not commenting on them, I have not necessarily rejected them.

An appropriate order follows.

ORDER

AND NOW, this 9 day of February, 1999, it is hereby ORDERED that summary judgment is GRANTED in favor of Time Inc., Belinda Luscombe, Newsweek Magazine, Johnnie L. Roberts and Richard Fischbein and against C. Delores Tucker and William Tucker, in accordance with the accompanying memorandum.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

99-1139

C. DELORES TUCKER;
WILLIAM TUCKER, her husband

v.

RICHARD FISCHBEIN;
BELINDA LUSCOMBE;
NEWSWEEK MAGAZINE;
JOHNNIE L. ROBERTS;
TIME INC.

C. Delores Tucker;
William Tucker,

Appellants

SUR PETITION FOR REHEARING

Present: SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, BARRY, AMBRO, and FUENTES, *Circuit Judges*, and ROSENN, *Senior Circuit Judge**

The petition for rehearing filed by appellee, Richard Fischbein, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

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* As to panel rehearing only.

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Feb. 14, 2001

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amendment XIV

* * *

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

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42 Pa.C.S.A. § 8343. Burden of Proof

(a) Burden of plaintiff. – In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant. – In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

Restatement (Second) of Torts § 566

§ 566. EXPRESSIONS OF OPINION

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.